

Editor's Note: Erratum issued on April 13, 2000, correcting error in MMS serial number in the first paragraph. The correct serial number is "MMS-94-0442-O&G" not "MMS-9-02-O&G."

BARBARA T. FASKEN

IBLA 97-442

Decided November 30, 1999

Appeal from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, denying an appeal of an order issued by the Dallas, Texas, Compliance Division, directing repayment of refunded royalties. MMS-9-02-O&G.

Reversed.

1. Oil and Gas Leases: Royalties: Generally

A lessee has an affirmative duty to obtain the best possible price for the oil and gas produced from the lease, consistent with reasonable business judgment. The statutory ceiling price for the gas produced from the lease is a relevant factor to consider when gas is valued for royalty purposes in accordance with 30 C.F.R. § 206.103 (1983). However, there is a presumption that a sales price resulting from arm's-length negotiation between a buyer and seller in settlement of an ongoing contract dispute reflects the market conditions. An assessment of an additional royalty based solely on a ceiling price will be reversed in the absence of evidence that the actual sales price does not adequately represent fair market value realized in a manner consistent with reasonable business judgment.

APPEARANCES: Everard A. Marseglia, Jr., Esq., Houston, Texas, for Appellant Barbara T. Fasken; and Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Barbara T. Fasken, a/k/a Fasken Oil and Ranch Interests, has appealed a January 13, 1997, decision issued by the Associate Director, Policy and Management Improvement, Minerals Management Service (MMS), denying her appeal of a June 28, 1994, order issued by the Dallas, Texas, Compliance Division, MMS. In its order, the Compliance Division directed Fasken to repay gas production royalties in the amount of \$990,536.59 that the Compliance Division determined had been improperly refunded.

The gas was produced from four wells that had qualified in March 1979 for stripper well pricing pursuant to section 108 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3318 (1988)(repealed effective 1993). 1/ A stripper well was defined by NGPA as a well producing nonassociated natural gas at its maximum efficient flow, with an average production rate not exceeding 60 Mcf per production day, during the preceding 90-day production period. 2/ 15 U.S.C. § 3318(b)(1) (1988). The Associate Director provided the following background for her decision:

On several occasions during 1983 and 1984, each of the four wells experienced increased production resulting in its disqualification for section 108 prices. However, after qualification as a stripper well, a well which exceeds the 60 Mcf per day limit can continue to qualify for section 108 pricing if the increased production is the result of recognized enhanced recovery techniques.

It was not until January 28, 1988, that Fasken filed petitions with the Bureau of Land Management (BLM), for continuing qualification for section 108 pricing for the four wells based on the use of recognized enhanced recovery techniques. The BLM issued final well determinations for the four wells approving the continued qualification for NGPA section 108 pricing, effective January 28, 1988, the date the petitions were filed. Since Fasken failed to file the petitions for continued qualification within the 150-day limit required by Federal Energy Regulatory Commission (FERC) regulations, 3/ BLM ruled that the stripper well prices were lost during the following periods:

<u>Well Name</u>	<u>Disqualification Period</u>
Shell Federal Com. Well No. 1	03/01/83 to 01/27/88
Skelly Federal Com. Well No. 1	12/01/83 to 01/27/88
Indian Hills Com. "A" Well No. 6	09/01/84 to 01/27/88
Ross Federal Com. Well No. 1	05/01/84 to 01/27/88

Fasken refunded Natural Gas Pipeline Company (Natural), the purchaser of all gas in question, over \$8 million reflecting the change in the maximum lawful price for gas produced

1/ Section 2(b) of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 158, repealed the wellhead price control provisions of the NGPA, 15 U.S.C. §§ 3311-3333 (1994), effective Jan. 1, 1993.

2/ The term "Mcf" is defined at 15 U.S.C. § 3301(29) (1994).

3/ MMS reported in its June 28 order that "[t]he applicable [FERC] regulations at 18 CFR § 271.805(f) provided that a petition for enhanced recovery status must be filed within 150 days of the last day of the 90-day period of increased production in order for stripper well price collections to continue without interruption."

for the four wells during the disqualification periods because during those periods the wells qualified for NGPA section 104 pricing rather than NGPA section 108.

In February 1991, Fasken requested a refund in the amount of \$990,536.59 from MMS for the allegedly overpaid royalties on the refunded sales proceeds. The MMS approved the refund request subject to future audit, by letter dated September 16, 1991. The MMS conducted a review of the royalty refund and determined that the royalty refund had been inappropriately taken. The MMS [Dallas Compliance Division] issued the June 28, 1994, order directing [Fasken] to pay additional royalties of \$990,536.59.

(Decision at 1-2.)

In its order, the Dallas Compliance Division cited 30 U.S.C. § 206.103 (1986), which provides that "[u]nder no circumstances shall the value of production * * * be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary." The Dallas Compliance Division then stated that "the lessee has an obligation to market the lease production prudently and otherwise act for the mutual benefit of both itself and the lessor." (Order at 4.) It ruled that

[h]ad Fasken timely filed for continued qualifications as required by FERC regulations, the NGPA Section 108 pricing for production from these wells would not have come into question. However, Fasken's failure to make timely filings as required by FERC and the resulting loss of NGPA section 108 pricing qualifications does not diminish the value of the gas in question for royalty purposes.

* * * * *

For the period during which the four wells were disqualified for NGPA Section 108 pricing, Fasken could and should have maintained the NGPA Section 108 qualification for the four wells and collected the higher stripper well prices. Therefore, for royalty purposes, the value for this gas is the applicable NGPA Section 108 stripper well price, which was the basis of the original royalty payments. Accordingly, Fasken's filing and receiving the royalty refund of \$990,536.59 was not appropriate and resulted in royalties for the affected leases being underpaid by an equal amount.

(Order at 3, 4.)

Fasken appealed to the Director pursuant to 30 C.F.R. § 290, arguing that the Compliance Division order was beyond MMS' authority, lacked a rational basis, and was an abuse of discretion. Fasken related that

this case involved more than whether she had filed for enhanced recovery status in a timely manner. According to Fasken, Fasken and Natural became

embroiled in an extremely contentious dispute concerning the Contract. The dispute originally arose in mid-1986 when Mrs. Fasken informed Natural that it had failed to perform certain quantity obligations under the Contract and other contracts between them. During 1987 the parties attempted to negotiate a settlement of these contract disputes.

On January 6, 1988, in the course of settlement discussions, Natural informed Fasken for the first time that certain enhanced recovery filings for the Wells had not been made. As a result, Natural refused to pay for December 1987 production at NGPA § 108 prices. After reviewing the matter, Fasken promptly made the enhanced recovery filings on January 28, 1988, with the [BLM]. Because of the substantial impact of the potential price refunds on Fasken's quantity claims, and in an attempt to invalidate Fasken's Contract claims, Natural instituted a lawsuit. Specifically, Natural sued Fasken for fraud, negligent misrepresentation and willful breach of contract, based on allegations of misconduct having to do with the initial qualifications for certain of the Wells. The value of Fasken's take-or-pay claims, minimum take and ratable take under the Contract was, of course, a function of the proper price in effect during periods when those claims accrued. The Lawsuit and each related administrative proceeding were hotly contested at every turn.

*** Fasken's enhanced recovery applications were strenuously opposed by Natural, who also opposed Fasken's request that the application be made retroactive to the dates on which the NGPA § 108 qualifications would otherwise have been lost.

On September 12, 1988, Fasken tendered to Natural the sum of \$6,062,749.38 in satisfaction of Fasken's share of the refund of over collections attributable to periods of time when the NGPA § 108 price had been collected after disqualifications. Thereafter, Natural continued to withhold payment for all gas sold under the Contract until such time as Natural had recouped the full amount of the refund ***. Nevertheless, during all pertinent periods, Fasken remitted federal royalty on all gas production as if Fasken received NGPA section 108 prices, even though for a substantial period of time Natural withheld payments for some or all of the gas sold under the Contract.

On October 31, 1988, the BLM issued final determinations that the Wells lost their NGPA section 108 qualifications as of various dates and regained those qualifications as of

January 28, 1988, the date Fasken filed the enhanced recovery applications. The BLM refused Fasken's request to make them effective retroactive to the dates as of which the NGPA section 108 qualifications were lost.

("Additional Statement of Reasons in Support of Notice of Appeal" to Director, at 3-5 (Footnotes omitted).)

In support of her appeal to the Director, Fasken asserted that the September 1991 approval of the refund was final and MMS lacked authority to reconsider the refund or make the refund conditional. Fasken contended that the payment of royalty under NGPA section 104 pricing was proper and was in accordance with the lease and the regulations. She argued that, as a result, she did not breach the duty to obtain the best price available and that she acted as a reasonably prudent lessee under the then existing conditions. Fasken also asserted that the Compliance Division order conflicted with MMS' May 3, 1993, "Dear Payor" letter relating to past pricing claims.

In her decision, the Associate Director addressed the four primary issues presented in Fasken's appeal to the Director. Finding the order did not lack a rational basis, the Associate Director stated:

Regardless of whether the royalties were paid at the time they were due, the fact remains that they were unpaid as of June 28, 1994, due to an inappropriate refund of the monies to the Appellant. The MMS order directing the Appellant to pay underpaid royalties or, in other words, repay an inappropriate refund, is subject to FOGMRA [Federal Oil and Gas Royalty Management Act of 1982] regulations.

(Decision at 3.) Addressing the contention regarding valuation of production, the Associate Director ruled that, under the Department's regulations, the royalty value may be greater than the actual price received when the latter does not reflect fair market value. After reviewing the principle of an implied marketing covenant, the Associate Director held Fasken breached a duty to obtain the best price available. Addressing Fasken's argument that she relied on her general manager and subcontractors to comply with the lease terms, the Associate Director rejected her assertion that she had acted prudently. The Associate Director summarily rejected the argument that MMS had no authority to reconsider the refund, noting that the Secretary is not estopped from correcting or overruling erroneous actions within the Department, and stating that the "United States does not waive its right to receive royalties lawfully due by acquiescing for a period of years to erroneous payments." (Decision at 5.) Referring to Fasken's argument regarding the effect of the May 3, 1993, "Dear Payor" letter, the Associate Director held that "[t]his argument misconstrues what is involved in the contract settlement and in the Dear Payor letter." (Decision at 5.) After noting that the letter addresses royalty on production subject to a past pricing dispute between a lessee and a purchaser, the Associate Director concluded that, in this case "the refund of the difference between NGPA section 104

prices and section 108 prices is not the subject of a past pricing dispute between the Appellant and its purchaser. It is not a dispute which is a subject of the contract settlement." Id. Fasken appealed to this Board.

In her statement of reasons (SOR), Fasken first discusses Board decisions holding that MMS may not collect royalty based on a higher price when there is evidence of a reasonable business reason to accept lower prices. She argues that the proper issue is whether it was reasonable for her to agree to lower prices in settlement with Natural, not whether she could have collected NGPA section 108 prices had she applied timely. She argues that MMS failed to consider the reasonableness of her actions, which, she contends, are supported by the record. Noting that Natural challenged both the application for retroactive section 108 pricing for the disqualification period and the initial qualifications, she explains:

[I]f Fasken had not settled, and had she pursued the FERC Adjustment Petition, Natural would have continued to attack the initial qualifications. Under that scenario, a victory for Natural on the merits would have rendered moot a victory for Fasken on the continued qualifications, and all Section 108 prices would have been lost for each Well as to which Natural prevailed. No royalty on Section 108 prices would have been due in that event.

(SOR at 22.) She relates that termination of all administrative proceedings related to the section 108 pricing dispute was fundamental to the compromise with Natural, and contends that it was therefore reasonable for her to settle in the manner she did to retain the benefits of section 108 prices for the period prior to and after disqualification. Fasken also contends that the Dear Payor letter controls, asserting that the letter makes it clear that only those amounts received in consideration of a settlement of a pricing dispute are royalty bearing. Fasken also notes that none of the leases specifies a minimum royalty, asserting that the Secretary must give due consideration to the price received by the lessee and that the Secretary is not given express authority to base royalty on the highest possible regulated prices a lessee might have received. She argues that she did not breach any implied duty but acted as a reasonably prudent operator.

Fasken again reasserts her position that the refund was a final action, alleging that there is no statutory or regulatory authority allowing MMS to reconsider its determination that royalties had been overpaid. Moreover, she argues that reserving the right to audit the amount of the refund cannot be construed as reserving the right to reconsider whether granting a refund was appropriate. She avers that "[t]o reopen its determination of overpaid royalties and claim reimbursement of the Refund, lacks any legal authority or rational basis, is fundamentally lacking in due process and constitutes an abuse of discretion." (SOR at 38.)

Finally, Fasken argues that MMS has failed to make a case for its assertion that she failed to comply with the royalty provisions of any

lease, applicable regulation, and that the record shows she made timely royalty payments contemporaneous with production.

In its answer, MMS states that

Fasken's failure to timely file for enhanced recovery determinations caused Fasken to [lose] the higher NGPA [section] 108 pricing. Therefore, it was a breach of its duty to market the gas at the best price obtainable and royalties are due on the higher NGPA § 108 price.

(Answer at 3 (emphasis omitted).) MMS cites the finding in Trigg Drilling Co., 138 IBLA 375, 380 (1997), that "the fact that the lessee failed to diligently apply for certification to obtain the highest ceiling price in a timely manner * * * will not preclude valuation for royalty purposes at the ceiling price for which the gas is found to be eligible," as supportive of its position. It further argues that the facts do not support Fasken's assertion that she did not breach a duty to market the gas at the best price obtainable. It counters Fasken's assertion that MMS is barred from seeking repayment relying on Conoco Inc., 114 IBLA 28, 39 (1990). In that case the Board held that the doctrine of accord and satisfaction did not preclude an order for repayment of an improper refund.

Fasken responded to MMS' answer. In her response, Fasken asserts that MMS' answer fails to address the issue before the Board, stating that MMS' "failure to file" argument misstates the law and is not supported by the facts. Fasken then states her opinion that "the evidence is uncontroverted that the pricing Fasken ultimately negotiated with its purchaser * * * was the result of the exercise of reasonable business judgment." (Reply at 3.) Fasken further asserts that neither MMS nor the record offers evidence in support of MMS' assertion that she would have qualified for section 108 pricing had she simply filed for it.

[1] In Viersen & Cochran, 134 IBLA 155, 164 (1995), we noted that

certain well-settled principles govern the construction and interpretation of the royalty provisions applicable to Federal oil and gas lessees. The regulations in effect both when the leases issued and in 1983 * * * essentially provided that the value of production for the purposes of computing royalty was the estimated reasonable value of the product as determined by the authorized officer giving due consideration to a number of factors. However, this was subject to the caveat that "[u]nder no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof." 30 CFR 221.7 (1979) and 30 CFR 206.103 (1983). This "gross proceeds" rule finds its genesis in the original regulations adopted to implement the Mineral Leasing Act. See 7 L.D. 552, 555 (1920); Walter Van Norman, 126 IBLA 375, 379-82 (1993). Insofar as the present discussion is concerned, the relevance of the "gross proceeds" rule resides in the realization that the Government's royalty interest is not burdened

with any of the costs of production and that, therefore, the "gross proceeds accruing" from the sale of production represents the minimum value acceptable as a basis for the computation of the amount of royalty due to the Government.

(Emphasis added.) Following this discussion the decision went on to state that

[t]he Department has consistently held that the obligation to market "is not a covenant read into the lease by implication" but rather is an affirmative duty expressly imposed under the terms of the lease via incorporation of the Department's regulations into the lease. See The Texas Co., 64 I.D. 76, 79-80 (1957). The leases in issue required the lessee "to abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such issues, including 30 CFR 221." * * * Thus, as the decision in The Texas Co. noted, judicial interpretations of the scope of the "implied" covenant to market are of limited utility since a Federal lessee's obligations in computing royalty are a matter of contractual interpretation and regulatory construction.

Id. at 164 n.8.

The regulation applicable to royalty valuation of gas at the time of the sales in question provided that:

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product * * * due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof * * *. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

30 C.F.R. § 206.103 (1983 through 1987); 30 C.F.R. § 221.7 (1982). ^{4/} However, as noted in Trigg Drilling Co., *supra* at 378-79:

In recognition of the increasing value of natural gas, the Department promulgated NTL-5 in 1977. Issued pursuant

^{4/} Effective Mar. 1, 1988, the Department removed 30 C.F.R. § 206.103 (1987). 53 Fed. Reg. 1184, 1218, 1220-21 (Jan. 15, 1988).

to the oil and gas operating regulations at 30 C.F.R. § 221 (including the regulation above-quoted, at 30 C.F.R. § 221.110 [and later at 30 C.F.R. § 206.103 (1987)]), the Department ruled in NTL-5 that the base value for royalty purposes for sales under an arm's-length transaction from wells commenced after June 1, 1977, "shall be the higher of: a. The price received by the lessee or operator in accordance with the provisions of the applicable sales contract, or b. The highest applicable ceiling rate then established by the FPC for the same vintage gas." 2 Fed. Reg. 22610 (May 4, 1977).

This rule, promulgated to protect the lessor's royalty interest in a time of rising gas prices, posed certain problems when gas prices subsequently declined, causing MMS to find that "unintended disparities between the royalty value of gas and its market value have been created." 51 Fed. Reg. 260, 261 (Jan. 3, 1986). Hence, MMS proposed a modification of NTL-5 * * *. This proposed regulatory change was never promulgated in rulemaking.

Thereafter, Congress effectuated by statute that which the Department failed to accomplish by rulemaking. For Federal onshore gas produced between January 1, 1982, and July 31, 1986, Congress provided that valuation for royalty purposes shall be "the reasonable value of the product as determined consistent with the lease terms and the regulations codified at part 206 of title 30, Code of Federal Regulations, in effect at the time of production." Notice to Lessees Numbered 5 Gas Royalty Act of 1987 (NTL-5 Act), Pub. L. No. 100-234, § 3(b), 101 Stat. 1719, 1720 (1988). This gave MMS the discretion to decline to apply the provisions of NTL-5 arbitrarily when this would not reflect the reasonable value of the gas. The statute noted, however, at section 3(d) that this provision did not

apply to any gas for which, in the Secretary's judgment, the lessee or royalty payor received less than the highest applicable price under the Natural Gas Policy Act due to a failure by the lessee or payor to collect amounts which the purchaser would have been required to pay under a gas sales contract providing for that price and not as a result of market conditions or considerations.

101 Stat. 1721.

(Footnotes omitted.) ^{5/} Thus, under NTL-5, when appropriate, the value of the product for royalty valuation purposes was the highest applicable ceiling rate under NGPA, and a lessee could not avoid responsibility for the higher royalty by neglecting to obtain the best return for the lessor.

^{5/} NTL-1 and NTL-5 have been superseded and terminated effective Mar. 1, 1988. 30 C.F.R. § 206.150(e); 53 Fed. Reg. 1230, 1271 (Jan. 15, 1988).

Fasken argues that this principle does not embrace the entire matter under review. She contends that the Department must also consider whether the "gross proceeds received" from Natural were the result of a reasonable business decision to settle a pricing dispute. In FMP Operating Co., 121 IBLA 328, 331-32 (1991), citing Transco Exploration Co., 110 IBLA 282, 96 I.D. 317 (1989), we stated:

An operator and a lessee have an affirmative duty to obtain the best possible sales price for the benefit of the royalty owner, consistent with reasonable business judgment. When the operator or lessee fails to carry out this responsibility it is proper for the royalty owner to seek payment based upon the higher sales price. Id. at 326-27, 96 I.D. at 384; Phillips Petroleum Co., [117 IBLA 230, 236 (1990)]. If [the lessee] was selling gas subject to a royalty and was paid the ceiling price under section 109 of NGPA, when it became eligible for classification under section 102 of NGPA, it would be obligated to seek section 102 certification or show why remaining certified under section 109 was consistent with reasonable business judgement. If it did not seek recertification under section 102 and could show no reasonable business basis for maintaining certification under section 109, it would be liable for royalties that would have accrued as if it had been certified under section 102.

The primary issue in this case is comparable to that addressed by the Board in Trigg Drilling Co., supra at 380-81:

[T]he fact that the lessee failed to diligently apply for certification to obtain the highest ceiling price in a timely manner and received a lower price in the interim will not preclude valuation for royalty purposes at the ceiling price for which the gas is found to be eligible. See FMP Operating Co., supra at 331-32; Mobil Oil Corp., [115 IBLA 304 (1990)] at 309-10. If the lessee was receiving less than the maximum ceiling price allowed under the NGPA, then valuation may properly consider the maximum Federal ceiling price. Id. Applying these principles, we find that Appellant has not denied the eligibility of the gas for section 103 prices for production from September 1981 through April 1982 when application for approval was belatedly filed. It was not until this application was made and Appellant entered negotiations with the buyer and sought, ultimately unsuccessfully, to obtain this price that the presumptive value was established as lower than the ceiling price. Accordingly, we find that the decision below must be affirmed as to valuation of production from September 1981 through April 1982.

Insofar as the period subsequent to April 1982 is concerned, it must be recognized that claims for royalties in excess of sale proceeds for failure to obtain the regulated ceiling price are subject to the defense that the lessee

exercised reasonable business judgment. See Transco Exploration Co., supra. In explaining the circumstances of the failure to obtain the section 103 ceiling price, Appellant states that:

In 1982, when Trigg first considered obtaining § 103 qualification for Browning Well gas, it notified Western of its intentions. Western flatly refused to pay anything above a price equivalent to that prescribed by § 104, which was the price applicable to most of its purchases from Trigg. After the economic concerns of both parties had been discussed at length, Trigg accepted a price equal to the § 104 level for all production sold from the Browning Well. Thus, the rate settled upon by Trigg and Western constitutes an amendment to the pricing provision of the 1974 American Quasar/Western Transmission Gas Purchase Agreement. The amendment was reached at arm's-length by two completely unrelated corporate entities.

(Supplemental SOR at 3.) In discussing the impact on valuation resulting from prices reduced by arm's-length negotiation between buyer and seller, we have noted that there is a presumption "that the price obtained fairly reflects the marketplace," although this does not preclude the Department "from determining that the new negotiated price does not adequately represent fair market value and requiring the lessee to submit royalty payments on a higher value basis than is actually obtained." Transco Exploration Co., supra at 322. In situations where the sale at a price less than the ceiling price was the result of arm's-length negotiations between buyer and seller, valuation at the ceiling price cannot be sustained in the absence of evidence under other regulatory indicia that the ceiling price represented the reasonable value of gas produced from the field. No such evidence is found in the record in this case.

Trigg Drilling Co., supra at 380-81 (footnotes omitted).

The facts in Trigg Drilling may be summarized as follows. The production qualified for a higher price category under NGPA. The lessee failed to file for the higher price category in a timely manner. When it did file, the buyer challenged the higher price and a settlement of the dispute between the lessee and the buyer was negotiated. The Board affirmed the royalty valuation based on the higher NGPA pricing as the presumptive value for that period for which the lessee did not demonstrate otherwise. However, the higher NGPA pricing was disregarded in favor of the negotiated sale price for the period following negotiations, based on the presumption that arm's-length negotiations produce prices reflective of the market.

We find, however, the anomalies of the instant situation are harder to reconcile when the specific facts of Trigg Drilling are considered because the period in which the royalties were in question in Trigg was when the price paid for natural gas was dropping significantly and the NGPA price was no longer applicable. We ask -- "Would the section 108 pricing have been negotiable had the lessee filed for the enhanced recovery determination in a timely manner?" At first glance, we would be inclined to answer "No," as MMS did, and conclude that nothing further need be considered. However, we must evaluate the negotiated settlement in the manner instructed by § 206.103.

During the entire disqualification period Fasken paid royalties based on the higher section 108 value. Fasken subsequently accepted the section 104 price during the period of disqualification in exchange for Natural's agreement to accept the section 108 price for the periods before and following the period of disqualification, to pay the section 108 price for all gas sold after settlement, and to not contest the stripper well status in the future. ^{6/} Fasken asserts that her decision to accept the section 104 price was reasonable and prudent in light of the circumstances at the time of settlement. We recognize that Fasken could have and, under her obligation to the Department as lessor, should have filed for reinstatement of section 108 status in a more timely manner. However, there is no evidence that Natural would not have pressed its ongoing litigation in pursuit of a determination that Fasken's wells did not qualify as stripper wells. If successful, Natural would have been able to purchase the gas produced from those wells at a lower price and seek a refund of the difference between the amounts paid at the section 108 price and the section 104 price. Thus, as Fasken has stated, her agreement to accept the section 104 prices during the disqualification period was not a strict function of her failure to file in a timely manner. It was an integral part of an arm's length negotiated settlement applicable to prior and subsequent contract prices. It appears that Natural and Fasken used the three periods as convenient, identifiable reference points upon which to base their negotiations and none of the associated NGPA prices for any of the periods was considered to be an absolute price by either party, but were subject to bargaining. Thus, MMS' decision not to consider the negotiation settlement as a factor in the royalty valuations was in error.

In Trigg Drilling, we found the sale price negotiated at arm's length to be the proper price for royalty valuation purposes even though it was lower than the ceiling price when there was no other evidence in the record "of a higher price paid or offered at the time of production in a fair and open market for the major portion of like-quality gas produced and sold from the field or area where the leased lands are situated." 138 IBLA at 381. Similarly, the only information regarding pricing in the record for this case was the section 104 and section 108 prices set by FERC during the period in question. The record establishes that the price negotiated by Fasken and Natural was realized as a result of an arm's length negotiated settlement of a contract dispute which began before the disqualification,

^{6/} The status of the wells was not an issue in either the BLM or the MMS proceedings.

continued through the disqualification period, and was settled after the wells had regained stripper well status. We therefore find that the gross proceeds received under the contract were reasonable and proper for royalty valuation purposes. Fasken is not required to return the refunded amount.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

R.W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

